No. 92-2058

In The

Supreme Court of the United States

October Term, 1993

HAWAIIAN AIRLINES, INC., *et al.*,

Petitioners,

vs.

GRANT T. NORRIS,

Respondent.

On Writ Of Certiorari To The Supreme Court Of The State Of Hawaii

BRIEF AMICI CURIAE OF THE STATES OF HAWAII, ARIZONA, CONNECTICUT, FLORIDA, ILLINOIS, INDIANA, KANSAS, MAINE, MICHIGAN, MISSOURI, MONTANA, NEW MEXICO, PENNSYLVANIA, AND WEST VIRGINIA, AND THE COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS IN SUPPORT OF RESPONDENT

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INTEREST OF THE AMICI CURIAE

The Amici States and Commonwealth are deeply interested in this case, in which Petitioners seek an unprecedented expansion of the preemptive effect of the Railway Labor Act, 45 U.S.C. §§ 151 *et seq.*, insofar as

made applicable to air carriers, *see id.* §§ 181-185, over state statutory and common tort law causes of action intended to protect employees in all lines of work, including those in the air carrier industry, from retaliatory and otherwise malicious discharges, suspensions, and demotions.

The State of Hawaii is one of a number of jurisdictions where protections for "whistleblowers" in the private work force exist either as a matter of statute or the common law of torts. The laws of these States are not limited to workers outside of the air carrier industries.[1]

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[1] Currently, at least thirty-five States have whistleblower statutes. *See* Alaska Stat. § 39.90.100 (1992); Ariz. Rev. Stat. Ann. § 38-531 (West Supp. 1992); Cal. Gov't Code § 10540; Colo. Rev. Stat. Ann. § 24.50.5-101 (West 1990); Conn. Gen. Stat. Ann. § 31-51q; Del. Code Ann, tit. 29, § 5115 (1991); Fla. Stat. Ann. § 112.3187 (West 1992); Haw. Rev. Stat. § 378-61 (Supp. 1992); 5 ILCS/1 (1993); Ind. Code Ann. § 36-1-8-8 (Burns Supp. 1992); Iowa Code Ann. § 79.28 (West 1991); Kan. Stat. Ann. § 75-2973 (Supp. 1992); Ky. Rev. Stat. Ann. § 61.101 (Michie/Bobbs-Merrill 1986); La. Civ. Code Ann. art. 30:2027 (West 1989); Me. Rev. Stat. Ann. tit. 26, § 831 (West 1988); Md. Code Ann. art. 64A, § 12F (Supp. 1992); Mich. Stat. Ann. § 17.428; Minn. Stat. Ann. § 181.932 (West Supp. 1993); Mo. Ann. Stat. § 105.055 (Vernon Supp. 1992); N.J. Stat. Ann. § 34:19-1 (West 1988); N.Y. Lab. Law § 740 (McKinney 1988); N.C. Gen. Stat. § 126-84 (1991); Ohio Rev. Code Ann. § 4113.51 (Anderson 1991); Okla. Stat. Ann. tit. 74, § 841.7 (West Supp. 1993); Or. Rev. Stat. § 659.505 (1991); 43 Pa. Cons. Stat. Ann. § 1421 (1991); R.I. Gen. Laws § 36-15-1 (1990); S.C. Code Ann. § 8-27010 (Law. Co-op Supp. 1992); Tenn. Code Ann. §§ 49-50-1401 & 50-1-304 (1990); Tex. Rev. Civ. Stat. Ann. art. 6252-16a (West Supp. 1993); Utah Code Ann. § 67-21-1 (Supp. 1992); Wash. Rev. Code Ann. § 42.40.010 (West 1991); W. Va. Code Ann. § 6C-1-1 (1990); Wis. Stat. Ann. § 230.80 (West 1987); Wyo. Stat. Ann. § 35-2-910 (Supp. 1992). Of these States, California, Connecticut, Hawaii, Indiana, Louisiana, Michigan, Minnesota, New Jersey, New York, Ohio, Oregon, Rhode Island, Tennessee, and Wyoming have statutes that apply to private employees.

Statutory remedies amplify and complement a wide array of common law entitlements, developed with care by the state courts, which as a matter of state tort law bar retaliatory discharges of private whistleblowers as contrary to public policy. *See, e.g., Parnar v. Americana Hotels, Inc.*, 65 Haw. 370, 652 P.2d 625 (1982); *McGrath v. TCF Bank Savings*, 509 N.W.2d 365 (Minn. 1993).

The States' interest in applying these whistleblower remedies to air carriers lies at the heart of the States' police powers, and conflicts with no federal policy. The Nation's airlines owe the highest duty of safety to the public. Each year, aircraft accidents take dozens of lives, and inflict millions of dollars in damage. Avoidance of the costs of air disasters is at the heart of the Amici's concerns in this case.

As this case so poignantly demonstrates, as a general matter the public's first line of defense against air disasters lies with the carrier's own inspection force – the trained men and women who are charged by law with the duty to examine the complex components that comprise an aircraft, to see to it that commercial aircraft that do not meet the highest standards of safety do not make their way out of the hanger, and, if in any respect there is doubt over an aircraft's airworthiness, that those doubts are communicated to relevant regulatory agencies, in most instances the Federal Aviation Administration (FAA).

As this case comes to this Court, there could not be a more compelling set of facts against federal preemption of state statutory remedies. Here, the summary judgment

record in the lower courts of Hawaii demonstrated that a Hawaiian Airlines mechanic, Respondent Grant Norris, was fired after reporting to the FAA that his employer was knowingly continuing to fly certain McDonnell-Douglas DC-9 aircraft with unsafe landing gear, and was falsifying safety reports – the mainstay of the FAA's air safety system – to cover-up this dangerous practice. The FAA investigation that resulted from Norris's whistleblowing ultimately led to substantial fines against the airline, as well as to administrative findings strongly suggesting that the airline had sought to frustrate the investigation and even to destroy material evidence. *See* J.A. 26-78. Evidence shows that Norris was punished by the airline for no other reason than his actions in reporting Hawaiian Airlines' dangerous conduct.

Unlike the area of rail safety, where Congress has enacted specific whistleblower protections that, for railroad workers, raise distinct preemption problems (*see* 45 U.S.C. §§ 441 *et seq.* (Federal Rail Safety Act)), Congress has not provided specific remedies for airline workers who blow the whistle on unsafe practices by their employers, clearly leaving intact at this general level such remedies as the States provide. The question presented in this case is whether Congress, in enacting the Railway Labor Act and applying it to air carriers, intended that a state jury, representing the community served by Hawaiian Airlines, and applying state statutes and rules of decision fashioned by a state legislature and a state's highest court, be prohibited from hearing Grant Norris's case – a case that does not depend on the relevant collective bargaining agreement, but rather solely on whether or not the airline acted with an illegal retaliatory intent in disciplining Norris.

The Amici States submit not only that the answer to this query is clearly "no," but that any other answer would give rise to a radical and unwise expansion of the preemptive force of the federal labor laws. Although it is true that state law wrongful discharge claims are, and doubtless should be, preempted where "the only source of [an employee]'s right not to be discharged, and therefore to treat an alleged discharge as a 'wrongful' one that entitles him to damages, is the collective-bargaining agreement," *Andrews v. Louisville & Nashville Railroad Co.*, 406 U.S. 320, 324 (1971), this Court more than thirty years ago made clear that the Railway Labor Act has no preemptive force with respect to state statutory remedies "protecting employees against [illegal] discrimination." *Colorado Anti-Discrimination Commission v. Continental Air Lines, Inc.*, 372 U.S. 714, 724 (1963). Here, as in *Colorado Anti-Discrimination Commission*, it is the employer's *intent* that matters. As in anti-discrimination litigation generally, whether the employer here was right or wrong as a matter of its contract interpretation is irrelevant to plaintiff's claim, and to the employer's defense. "Whistleblower" protection doctrine, in Hawaii and elsewhere, does not punish an employer who disciplines an employee for good reasons, bad reasons, or no reasons at all, so long as the reasons that the employer actually acted upon were not the illegal reasons of retaliating for an employee's whistleblowing. *See St. Mary's Honor Center v. Hicks*, 113 S. Ct. 2742 (1993); *University of Pennsylvania v. EEOC*, 493 U.S. 182 (1990). As the States have compelling interests in protecting those airline employees who in their professional judgments bring substantial safety concerns to the attention of regulatory agencies, they have a substantial and weighty interest in this case,

and urge the Court to affirm the judgment of the Supreme Court of Hawaii.

SUMMARY OF ARGUMENT

1. Section 184, Title 45, United States Code, does not require submission of Respondent's state whistleblower claims to mandatory binding arbitration, as those claims do not seek to enforce rights conferred by a collective bargaining agreement. Petitioners' reliance on the term "grievance" in § 184 simply reads that term out of context, and without regard to the background rule of at-will employment which "rates of pay, rules, or working conditions" agreed upon expressly or impliedly by air carriers and their unions abrogate. *See* 45 U.S.C. § 184 at ¶ 1. In addition to disregarding the literal language of § 184 and its predecessors, *i.e.*, 45 U.S.C. § 153 First (i), Hawaiian Airlines would have this Court ignore decades of its own interpretation of the arbitral scheme established by the RLA. Under this Court's longstanding precedents, the RLA's arbitral mechanism applies only to so-called "minor disputes" under the Act: "major disputes seek to create contractual rights, minor disputes to enforce them." *Consolidated Rail Corp. v. Railway Labor Executives Association*, 491 U.S. 299, 302 (1989); *see Brotherhood of Railroad Trainmen v. Chicago River & Indiana Railroad Co.*, 353 U.S. 30, 33 (1957); *Machinists v. Central Airlines, Inc.*, 372 U.S. 682, 687 (1963). By the same token, it is only such contract-enforcing claims that are preempted by the RLA's arbitral mechanism. *Cf. Andrews v. Louisville & Nashville Railroad Co.*, 406 U.S. 320, 324 (1971). Because Respondent's state law claims do not "seek" "to enforce" any contractual rights whatsoever, they thus are not pre-empted.

2. Petitioners' prayer for reversal runs headlong into this Court's unanimous decision in *Colorado Anti-Discrimination Commission v. Continental Air Lines, Inc.*, 372 U.S 714, 724 (1963). That decision, which squarely upheld the ability of States directly to prosecute claims of invidious racial discrimination in air carrier hiring, is equally applicable to the instant context, where invidious discrimination based upon protected whistleblowing activities is the target of the state claim. It should make no difference, here, that a State has delegated its law enforcement function to a "private attorney general." The rationale of *Colorado Anti-Discrimination Commission* is thus fully applicable to the instant suit, and dictates affirmance.

3. The rationale of this Court's decision in *Atchison, Topeka & Santa Fe Railway Co. v. Buell*, 480 U.S. 567 (1987), in which this Court held that the RLA did not conflict with, and therefore did not impliedly repeal, the remedies of the Federal Employers' Liability Act, similarly mandates that state tort remedies not dependent on a collective bargaining agreement be read as creating no "intolerable conflict" with the arbitral mechanism created for "minor disputes" under the RLA. If the arbitral mandate of the RLA were as all-encompassing as the airline here urges, the Court in *Buell* would have been required to find an "intolerable conflict" between the later-enacted RLA and the FELA. That it did not points the way to resolution of the preemption issue here, on which the airline may prevail only if Congress' intent is clear that state jury resolution of the retaliatory discharge claims in this case " 'conflicts with federal law or would frustrate

the federal scheme.' " *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 209 (1985). Because such clarity does not exist, preemptive intent should not be assumed.

4. The Court should not expand the preemptive effect of the RLA as Petitioners suggest, for to do so would radically unhinge the doctrinal basis of "federal common law" as it has developed in the field of labor relations, both under the RLA, and the NLRA, both intrusively injecting the federal courts into areas of traditional state concern, thus raising significant issues under the Tenth Amendment, and, as well, triggering serious problems under the First and Seventh Amendments. In its practical impact, preemption of the sort sought by the airline here would operate as a federal mandate for the States to accept intentionally unsafe air carriers within their borders without any recourse through their courts except after-the-fact. *Cf. New York v. United States*, 112 S. Ct. 2408, 2421 (1992). Petitioners' request for elimination of Respondent's jury trial rights, a sharp curtailment of judicial review, and nullification of his right to compensatory and punitive damages, without any *quid pro quo*, independently raises serious and substantial constitutional questions. In the absence of much clearer congressional language than is present in 45 U.S.C. § 184, the Court should confine the statute's preemptive effect to claims arising out of a collective bargaining agreement. *See Frisby v. Schultz*, 487 U.S. 474, 483 (1988); *DeBartolo Corp. v. Florida Gulf Coast Trades Council*, 485 U.S. 568, 575 (1988).

ARGUMENT

I. The Language of the Railway Labor Act, as Applied by Congress to Air Carriers, and as Consistently Construed by This Court, Applies Solely to Contract-Based Disputes.

Section 184 of Title 45, United States Code, provides that "[t]he disputes between an employee or group of employees and a carrier or carriers by air growing out of grievances, or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions" must, if not resolved by the "usual" company process for internal disputes, be submitted to an adjustment board chosen by the carrier and its employees.

This language, drawn from 45 U.S.C. § 153 First (i), has for decades been construed by this Court to confine the arbitral mechanism of the RLA to claims that arise out of disputes over collectively bargained rates, rules, or job conditions. As early as *Brotherhood of Railroad Trainmen v. Chicago River & Indiana Railroad Co.*, 353 U.S. 30 (1957), the Court described the disputes subject to arbitration as "controversies over the meaning of an existing collective bargaining agreement in a particular fact situation, generally involving only one employee." *Id.* at 33. These disputes, the Court observed six years later, concern "the interpretation and application of existing contracts." *International Association of Machinists, AFL-CIO v. Central Airlines, Inc.*, 372 U.S. 682, 687 (1963). Thus, most recently, in *Consolidated Rail Corp. v. Railway Labor Executives Association*, 491 U.S. 299 (1989), this Court reiterated the two-tiered categorical analysis that determines what sort of treatment activity that is in some fashion subject to the RLA is to receive. That analysis divides RLA-governed conflict into "major and minor disputes," recognizing

that "the major/minor terminology, drawn from the vocabulary of rail management and rail labor, as a shorthand method of describing the two classes of controversy Congress had distinguished in the RLA; major disputes seek to create contract rights, minor disputes to enforce them." *Id.* at 302 (citing *Elgin, J. & E. R. Co. v. Burley*, 325 U.S. 711, 1723 (1945)). Implicit in *Trainmen, Machinists,* and *Conrail,* is the unquestionable proposition that there are categories of disputes involving employees and covered carriers that are not subject to RLA jurisdiction at all. In a similar vein, in *Andrews v. Louisville & Nashville Railroad Co.*, 406 U.S. 320, 324 (1972), which held that RLA arbitration, where apt, is mandatory and exclusive, the Court properly ruled that where "the only source of [an employee's] right not to be discharged, and therefore to treat an alleged discharge as a 'wrongful' one that entitles him to damages, is the collective-bargaining agreement," the RLA preempts state-law causes of action because in such a case interpretation of the agreement is absolutely necessary to deciding the case. *Id.* This is not so here.

II. To Read the Railway Labor Act to Preempt State Whistleblower Claims Would Require Overruling the Court's Unanimous and Considered Conclusion that State Anti-discrimination Remedies are Not Preempted, and Would Wrongly Threaten a Wide Array of Quasi-Criminal State Laws.

Read broadly, the preemptive provisions of 45 U.S.C. § 184 could reach even the *criminal* law of the States, when that law was drawn in play by "disputes between an employee . . . and a carrier." 45 U.S.C. § 184. It is obvious that a State's interest in enforcing its criminal laws in its own courts, an interest this Court has

described as "one of the most powerful of the considerations" that "must influence our interpretation" of federal preemptive statutes, *see Kelly v. Robinson*, 479 U.S. 36, 49 (1986), cannot be overcome by the language or policies of the RLA. Yet, when all is said and done, that is exactly what the Petitioners ask this Court to repudiate here.

Such a repudiation of the police powers of the States is not, and could not be, the proper result under the law. The relationship between a State's criminal and anti-discrimination laws is a close one. *See Ohio Civil Rights Commission v. Dayton Christian Schools*, 477 U.S. 618 (1986) (holding that abstention under *Younger v. Harris*, 401 U.S. 37 (1971), applies to state court litigation brought under anti-discrimination laws, in part because such laws implicate "important state interests"). In fact, thirty years ago this Court squarely held in *Colorado Anti-Discrimination Commission v. Continental Air Lines, Inc.*, 372 U.S. 714 (1963), that nothing in the RLA "bar[s] States from protecting employees against racial discrimination." *Id.* at 724. That admonition is squarely applicable to this case as well, for there is no principled difference for preemption purposes between state laws aimed at deterring invidious racial discrimination, and those targeted at invidious discrimination on the basis of protected conduct. Nor is this case different from *Colorado Anti-Discrimination Commission* because Hawaii has chosen to delegate to a "private attorney general" the authority to invoke the "public-policy" exceptions to the doctrine of employment-at-will. Congress itself, in exercising its enforcement authority under the Commerce Clause and Section 5 of the Fourteenth Amendment, has indeed made clear that retaliatory discharges are amenable to *judicial* resolution. *See* 42 U.S.C. § 2000e-3(a). Petitioners have no argument that

federal anti-retaliation protection is nullified by 45 U.S.C. § 184, *cf. Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), and offer no persuasive argument why analogous protection under state law ought be subject to the draconian treatment they seek.

Instead, Petitioners offer a set of exceedingly weak arguments for divesting the state courts of authority to hear why exactly Mr. Norris was disciplined after reporting his safety concerns to the FAA. Thus, Petitioners rely on the "whistle-blower" statute contained in the Federal Rail Safety Act of 1970, 45 U.S.C. §§ 421 *et seq.*, which has no analogue in the area of air carrier safety. *See* Pet. Br. at 12. Such reliance rests upon a theory of "implied preemption" that this Court has repeatedly rejected. Absent a "clear and manifest indication that Congress sought to supplant local authority," *Wisconsin Public Intervenor v. Mortier*, 111 S. Ct. 2476, 2485 (1991), this Court has allowed the States to enforce neutral regulatory measures, and to adjudicate state-law causes of action that vindicate legitimate health and safety interests. The fact that, as Petitioners concede, the FRSA contains an "explicit preemption provision," Pet. Br. at 14 n.6, calls up "the familiar principle of *expression unius est exclusio alterius:* Congress' enactment of a provision defining the preemptive reach of a statute implies that matters beyond that reach are not preempted." *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608, 2618 (1992). That rule governs this case.

Petitioners, and their amici, also rely heavily on this Court's decision in *Elgin, J. & E. R. Co. v. Burley*, 325 U.S. 711 (1945), as creating an expansive "omitted case" doctrine, akin to an arbitral "black hole," from which no state law claims can escape. As Respondent points out, the

"omitted case" language in *Burley* is *dicta*, and has spawned confusion in the lower courts. That confusion, however, is resolved by the following language of *Conrail:* "the line drawn in *Burley* looks to whether a claim has been made that the terms of an *existing agreement* either establish or refute the presence of a right to take the disputed action." 491 U.S. at 305 (emphasis added).

Here, we have essentially a summary judgment record raising a wealth of evidence that Hawaiian Airlines disciplined Norris for no other reason than his damaging report to the FAA. The Supreme Court of Hawaii, adopting as its own the deferential standards of the lower federal courts on analogous jurisdictional questions, *see* Pet. App. 6a, construed this evidence favorably to Norris, and to this degree the decision of the court below rests upon an independent and adequate state ground. *See Orr v. Orr*, 440 U.S. 268, 274 (1979). Viewing this record as did the Supreme Court of Hawaii, as this Court must, Respondent's claim does not in any way implicate the collective bargaining agreement's language. Similarly, because Hawaiian Airlines is privileged, so far as Norris's whistleblower claims are concerned, to "us[e] any criteria it may wish to use, except those . . . prohibited under [anti-retaliation doctrine,]" *University of Pennsylvania v. EEOC*, 493 U.S. 182, 198 (1990), Petitioners need not, and, more importantly, a state *court* need not, resort to the collective bargaining agreement at all to determine whether Respondent's claim stands or falls. It is not necessary for the state juries even to know what is in the collective bargaining agreement, much less to construe it, as it is Petitioners' and their agents' wrongful intent, *vel non*, that matters here. *See St. Mary's Honor Center v. Hicks*, 113 S. Ct. 2742, 2751 (1993) (the required

finding is "that the employer's action was the product of unlawful discrimination," not that "the employer's explanation of its action was not believable"). *Compare Wheeler v. St. Paul Companies, Inc.*, 1994 WL 11272, 11272*1 (Minn. App. Jan. 18, 1994) ("The burden of proof in a whistleblower claim is the same as for an employment discrimination claim"), *with* Pet. App. 19a ("[T]he respective positions of the parties to be presented at trial are . . . 'purely factual questions [which] pertain[ ] to the conduct of the employee and the conduct and motivation of the employer. Neither of [the parties' positions] requires a court to interpret any term of a collective bargaining agreement' ").

For these reasons alone, the Court should affirm.

III. The Rationale of this Court's Decision Holding that the Railway Labor Act Does Not Impliedly Repeal Railroad Employees' Rights to Go to Court Under the Federal Employer Liability Act Also Supports Affirmance of the Judgment.

Although the arguments presented above are more than sufficient to support the judgment of the Supreme Court of Hawaii, it is clear that this Court should affirm for the additional reason that to do otherwise would severely undercut the rationale of *Atchison, Topeka & Santa Fe Railway Co. v. Buell*, 480 U.S. 557 (1987). In *Buell*, the Court was called upon to decide whether a railroad employee was barred by the RLA from bringing an action for damages under the Federal Employers' Liability Act, simply because conduct related to the injury could have been subject to arbitration under the RLA.

In rejecting the argument that the RLA, enacted after the FELA, impliedly repealed the jury trial rights conferred by the FELA, the Court held that "[i]t is inconceivable that Congress intended that a worker who suffered a disabling injury would be denied recovery under the FELA simply because he might also be able to process a narrow labor grievance under the RLA to a successful conclusion." *Buell*, 480 U.S. at 565. The Court quoted with approval then-district Judge J. Skelly Wright's conclusion that " 'the Railway Labor Act . . . has no application to a claim for damages to the employee resulting from the negligence of an employer railroad.' " *Id.* In turn, the Court distinguished *Andrews v. Louisville & Nashville Railroad Co.*, 406 U.S. 320 (1972), as involving a claim where the worker "brought a state wrongful discharge claim based squarely on an alleged breach of the collective bargaining agreement." *Id.* at 566. That state law claim was properly held preempted in *Andrews* only because the RLA dispute resolution mechanism was "mandatory for that type of dispute." *Id.*

In rejecting the railroad's argument, the Court adopted reasoning that is fatal to Petitioners' claim here. The *Buell* Court held there was no "intolerable conflict" between the FELA remedy and the arbitral scheme of the RLA, rejecting the railroad's "parade of horribles" in light of the difficulties of proving the sort of emotional distress claims the railroad feared would upset the RLA's scheme. 480 U.S. at 566-67 & n.13.

This conclusion is relevant to the preemption analysis in this case as well. " ' "The purpose of Congress is the ultimate touchstone" ' of pre-emption analysis." *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608, 2617 (1992) (quoting *Malone v. White Motor Corp.*, 435 U.S. 497, 504

(1978)). This test is not materially different than the test applied to the railroad's "implied-repeal" argument in *Buell*, and, for this reason, *Buell* is very significant support for the no-preemption ruling below. This is particularly true in that the disuniformity which the Petitioners trot out in their own "parade of horribles" (*see* Pet. Br. at 19-23) fully exists already in the FELA context, where rail workers have for decades been able to choose between state and federal courts when bringing their claims. *E.g.*, *Dice v. Akron, Canton & Youngstown Railroad*, 342 U.S. 359 (1952). In addition, as in *Buell*, given the difficulties of proving a whistleblowers' case, as well as what one would certainly hope is the infrequency of factual scenarios that generate substantial whistleblower lawsuits, Petitioners' argument that affirmance here would "open the floodgates" proceeds from assumptions that are, at best, totally speculative, if not wholly mistaken.[2]

Indeed, reversal of the Supreme Court of Hawaii's ruling in this case, rather than preserve the RLA's arbitral mechanism, would summarily displace, through the guise of RLA arbitration, the operation of workers' compensation systems in all of the States and Territories. Because airline workers are not subject to FELA protection, if Petitioners are correct in this case, then it is also true that workers' compensation disputes fall within the

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[2] Moreover, if one is looking to reduce litigation as a whole, one would hardly allow airlines to shunt their employees who validly blow the whistle on airline safety violations into the "narrow labor grievance under the RLA." *Buell*, 480 U.S. at 565. Had the safety violations Norris disclosed been kept secret as certain Hawaiian Airlines' employees at least seemingly intended, an extremely serious accident could have occurred, in which case dozens of lawsuits would certainly have followed.

ambit of 45 U.S.C. § 184, and no State could apply its mechanisms for resolving workers' compensation matters with respect to air carrier employees. Such a result, leading at a minimum to "[d]elay, misunderstanding of local law, and needless federal conflict with the state policy," *Burford v. Sun Oil Co.*, 319 U.S. 315, 327 (1943), and an absurd and unjustified diminution in the rights of air carrier workers vis a vis those of rail workers, is hardly a rational one, and could not be reasonably deemed to have been the intent of Congress when it brought air carriers within the coverage of the RLA in 1936.[3]

To avoid this result, the Court should affirm the judgment.

IV. Petitioners' Construction of the RLA Should Also Be Rejected Because it Raises Significant Constitutional Questions Under the First, Seventh, and Tenth Amendments.

Even if the foregoing arguments were insufficient to counsel affirmance in their own right, "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *DeBartolo Corp. v. Florida Gulf Coast Trades Council*, 485 U.S. 568, 575 (1988). This rule "has for so long been applied by this Court that it is beyond debate." *Id.*; *see also Frisby v. Schultz*, 487 U.S. 474, 483 (1988). This rule applies here three times over.

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[3] The Court impliedly so held in *Pan American World Airways, Inc. v. Puchert*, 472 U.S. 1001 (1985) (dism'ing appeal from *Puchert v. Agsalud*, 67 Haw. 25, 677 P.2d 449 (1984)).

As an initial matter, it is important to emphasize that the remedies provided by RLA arbitration have been held to be "narrow," providing no general damages, nor punitive damages. *Buell*, 480 U.S. at 565 & n.12. Similarly, there is nothing in the RLA that eases the evidentiary burdens upon Norris (as in the "compromise" worked by workers' compensation laws; *see, e.g., Second Employers' Liability Cases*, 223 U.S. 1 (1912)). Therefore, there is no "quid pro quo" here to cushion the harm inflicted by federal preemption on individuals like Norris, and the State of Hawaii, whose laws vindicate its people's interests. *New Motor Vehicle Board of California v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers).

Whether the United States Congress could constitutionally foreclose the rights of Hawaii citizens such as Grant Norris through mandatory arbitration of the nature sought in this case is at best unclear. This Court has held, for example, that "filing a complaint in court is a form of petitioning activity," *McDonald v. Smith*, 472 U.S. 479, 484 (1985), and, at a minimum, federal preemption, to be constitutional, would require showings sufficient to meet applicable limits on "time, place, and manner" regulation. *Compare Ward v. Rock Against Racism*, 491 U.S. 781, 797 (1989) (identifying permissible scope of such regulation), *with Walters v. National Association of Radiation Survivors*, 473 U.S. 305, 334-35 (1985) (upholding limits only on the amounts to be paid to counsel). Independent of First Amendment interests, any abolition of Norris's state-crated jury right raises a legitimate question under the Seventh Amendment. The Court has made clear that "[t]he Seventh Amendment does apply to actions enforcing statutory rights, and requires a jury trial upon demand, if the statute creates legal rights and remedies,

enforceable in an action for damages in the ordinary courts of law." *Curtis v. Loether*, 415 U.S. 189, 193 (1974). It is clear that Norris would be entitled to a jury trial in the federal courts if, for example, he were employed by an out-of-state air carrier, and sued either under the state whistleblower statute or the common law exception to at-will employment, and it is doubtful that Congress could abolish that jury right in the Courts of the United States, particularly as the arbitral forum here provides nothing in the way of a *quid pro quo* for elimination of the advantages of the state law suit. These doubts are equally applicable to this case, where Norris sought (and fought for) a state forum against the air carrier. *See also Johnson v. Robinson*, 415 U.S. 361 (1974) (on the presumption against the elimination of plenary judicial review).

The States, moreover, have independent constitutional interests in police power measures intended to protect the health, welfare, and safety of their citizens. Here, it should be noted, Hawaiian Airlines' McDonnell-Douglas DC-9 aircraft were slated solely for inter-island travel. An accident which involved one of the subject aircraft would doubtless have affected many Hawaii citizens, both on the ground, and in the air, and would have had extensive secondary effects on local property, and on the local economy as a whole, which is heavily dependent upon tourism. It is also clear that the State of Hawaii has very little – if any – ability to keep Hawaiian Airlines from actually flying within the State of Hawaii. *See Morales v. Trans World Airlines, Inc.*, 112 S. Ct. 2031 (1992). Under these circumstances, all Hawaii can do is protect those who act as the eyes and ears of the public – Hawaiian Airlines' trained inspection personnel – from retaliation for reporting airline safety problems to relevant federal authorities. To strip the State of this last vestige of

its ability to protect itself and its residents would raise a very serious Tenth Amendment issue under this Court's decision in *New York v. United States*, 112 S. Ct. 2408 (1992). In that case, the Court held that the "take title" provisions of Low-Level Radioactive Waste Policy Amendments of 1985 to be an unconstitutional "congressionally compelled subsidy from state governments to nuclear waste producers." *Id.* at 2428. Reversal of the judgment portends a similar sort of subsidy from the States to the air carrier industry. The Court should thus affirm.

CONCLUSION

For the reasons above, the judgment should be affirmed.

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